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HAROLD B. WILLEY, C

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1954

**No. 588**

ILLINOIS CENTRAL RAILROAD COMPANY, ET AL,
*Appellants*

*vs.*

MISSISSIPPI PUBLIC SERVICE COMMISSION, ET EL, ..... *Appellees*

**No. 589**

INTERSTATE COMMERCE COMMISSION, *Appellant*

*vs.*

MISSISSIPPI PUBLIC SERVICE COMMISSION, ET EL, ..... *Appellees*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION

## MOTION TO AFFIRM

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Now comes the Mississippi Public Service Commission, appellee in the above entitled causes, pursuant to Rule 16, paragraph 1 (c), of the Revised Rules of this Court, and moves that the judgment of the District Court be affirmed on the ground that it is manifest that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument.

There is here involved direct appeals by the Interstate Commerce Commission and the Illinois Central Railroad

Company and others from a final judgment entered October 12, 1954, by a three-judge District Court convened pursuant to Sections 2284 and 2325, Title 28, U. S. C., setting aside and permanently enjoining the enforcement of an order of the Interstate Commerce Commission attempting to prescribe intrastate freight rates for the transportation of certain commodities within Mississippi under Section 13 (4) of the Interstate Commerce Act, 49 U. S. C., Sec. 13 (4). The majority opinion of the court below is reported at 124 F. Supp. 809, and is attached as Appendix A to both jurisdictional statements filed herein.

The railroads here involved sought before the Mississippi Public Service Commission increases in intrastate freight rates and charges similar to those authorized interstate by the Interstate Commerce Commission in *Increased Freight Rates,* 1951, 284 I. C. C. 589, commonly referred to as Ex Parte 175. The Mississippi Commission authorized the full increase sought on all less than carload freight and on all carload freight, except as to carload line haul rates of the commodities here involved.

Thereupon, the carriers filed their petition with the Interstate Commerce Commission under Section 13 (4), Part I, of the Interstate Commerce Act, and, pursuant thereto, the Interstate Commerce Commission entered into an investigation which culminated in the order which was set aside and permanently enjoined by the District Court. Both the Commission and the railroads which intervened in support of the Commission's order have appealed from the District Court's judgment.

The only specific assignment in the Jurisdictional Statement of the appellant railroad is, in effect, that the

District Court erred in holding the Commission's order to be unsupported by substantial evidence and that the court erroneously substituted its judgment for that of Commission on factual matters (Jurisdictional Statement of railroads, page 4). On the other hand, the Jurisdictional Statement of the Commission raises five specific questions, the first two of which deal with the question of whether the Commission's order was supported by substantial evidence and whether the court erroneously substituted its judgment for that of the Commission on factual questions (Commission's Jurisdictional Statement, page 3). The remaining three (Jurisdictional Statement, page 4) may be paraphrased as follows:

(a) Whether the District Court erred in holding the evidence legally insufficient because there was no segregation of interstate and intrastate operating statistics.

(b) Whether the District Court erred in holding that it was necessary that discrimination against interstate shippers be shown before the Commission could exercise its power under Section 13 (4).

(c) Whether the District Court erred in holding that the Commission committed an error of law in disregarding the evidence that passenger deficits were substantially lower in Mississippi than in the South generally or the nation as a whole.

We think it will become clear that the real issue in this cause is whether the Court below "misapprehended or grossly misapplied" the standard for a judicial determination of the substantiality of the evidence to support the Commission's order under the rules laid down in *Universal Camera Corp. v. National Labor Relations Board,* (1951), 340 U. S. 474. That this was the controlling

question in the case was clearly recognized by the District Court. It said:

> "The paramount question for determination is whether or not there was substantial evidence to support the finding of the Commission." 124 F. Supp., page 813.

The standard by which this question is to be determined has been fully, elaborately and exhaustively set forth by the Supreme Court in the *Universal Camera* case as recently as February 26, 1951. There appears to be no necessity at this time to review, restrict, alter, expand or elaborate upon the rule clearly and positively laid down in this case, and we believe that, regardless of any question which appellants may raise or endeavor to raise, directly or indirectly, this cause must be affirmed unless, in holding that the Commission's order was not supported by substantial evidence, the District Court "misapprehended or grossly misapplied" the principles enunciated in this case. We submit that the applicable law is clear and that the District Court neither misapprehended nor misapplied the standards fixed by *Universal Camera* and, therefore, that nothing substantial is presented in this case which needs or requires further argument.

We will discuss the questions raised by the Jurisdictional Statements in the order which we have stated them above.

## I.

## THE CONTENTION THAT THE DISTRICT COURT ERRONEOUSLY SUBSTITUTED ITS JUDGMENT FOR THAT OF THE COMMISSION ON FACTUAL QUESTIONS AND THE QUESTION OF WHETHER OR NOT THE COMMISSION'S ORDER WAS SUPPORTED BY SUBSTANTIAL EVIDENCE.

We submit that the opinion of the District Court clearly shows that it correctly and fully apprehended the rule and standards laid down in the *Universal Camera* case. This case makes it clear that the standard of judicial review under the Administrative Procedure Act is identical with the standard under the Taft-Hartley Act (see 340 U. S., pages 487, 490), and that this standard is far removed from one of judicial abdication or unquestioned rubber stamping of administrative findings. We quote selected portions of the *Universal Camera* opinion along with statements from the District Court's opinion so that this Court may compare one with the other and thus determine how scrupulously the District Court adhered to the standards set forth in the cited case.

In *Universal Camera,* the Court, in referring to the attitude of the sponsors of the Administrative Procedure Act, said:

> "On the one hand, the sponsors of the legislation indicated that they were reaffirming the prevailing 'substantial evidence' test. But with equal clarity they expressed disapproval of the manner in which the courts were applying their own standard. The committee reports of both houses refer to the practise of agencies to rely upon 'suspicion, surmise, implications, or plain incredible evidence,' and indicate that the

courts are to exact higher standards 'in the exercise of their independent judgment' and on consideration of 'the whole record.' " 340 U. S., pages 474, 475.

On page 487 of 340 U. S., there is the following statement:

"Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitely precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement in both statutes that courts consider the whole record."

On page 488 of 340 U. S., the court went on to say:

"Congress has merely made it clear that a court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting the decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view."

From page 490 of 340 U. S.:

"We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress

has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals. The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both."

The opinion of the District Court makes it manifest that the court did not misapprehend these standards; on the contrary, the court specifically adhered to them. In its opinion (124 F. Supp., page 814), the District Court said:

"The Court in reviewing an order of the Interstate Commerce Commission has the duty to study the entire record and *it is the function of the Court to determine from the whole record whether or not there was substantial evidence before the Commission* upon which its order could be based. If there were no substantial evidence then it is the duty of the Court to set aside such order and enjoin its enforcement. Congress in enacting in 1946 the Administrative Procedure Act made it mandatory that the reviewing court should set aside an order that was unsupported by substantial evidence and that it should review the whole record in making the determination. *The Supreme Court of the United States in Universal Camera Corporation v. N. L. R. B.*, 340 *U. S.* 474, *held that in determining what is substantial evidence that the Court must take into*

*consideration whatever in the record fairly detracts from its weight.* Under the decision in that case it is the duty of the reviewing court when it cannot conscientiously find that the evidence supporting the order of the Commission is substantial, when viewed in the light that the record in its entirety furnishes, including the body of the evidence opposed to the Board's view, to set aside the order of the Commission." (Emphasis added.)

And on page 815 of 124 F. Supp., the District Court said:

"The order in this case when viewed in the light of the entire record and all of the circumstances leading up to its passage and giving weight to all things that detract from the sufficiency of the evidence is not supported by substantial evidence and must be set aside and its enforcement enjoined. It is a delicate duty placed upon the reviewing court to determine the line of demarkation and to adjudicate the point where the authority of the state commission ends. The court does not have the power to settle disputes in the testimony, but *it must consider the entire record and determine as a matter of law if there was substantial evidence to support the order.*" (Emphasis added.)

We submit that the pronouncements of the District Court which are quoted above square perfectly with the standards laid down in *Universal Camera,* and, therefore, that it cannot successfully be argued that the District Court misapprehended the standard to be applied.

It is not our purpose here to review exhaustively the evidence and lack thereof which led the District Court to conclude that the Commission's order was not supported by substantial evidence. The opinion itself is its

own best expositor and it reveals that careful, deep, searching and conscientious analysis was given by the District Court to the record before it. The opinion itself refutes, we submit, the suggestion that the standards laid down in *Universal Camera* were grossly misapplied. There is no indication or suggestion in the opinion that the Court was seeking to modify or avoid any of the standards and tests laid down by the Supreme Court; the issue was purely and simply whether or not the Commission's order was supported by substantial evidence, and this issue was met by the District Court fairly and accurately. What the appellants here seek is that this Court should repeat a task already performed by the initial reviewing court—that of weighing the evidence to determine its substantiality. As to this, the *Universal Camera* opinion says:

> "Our power to review the correctness of application of the present standard ought seldom to be called into action. Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." 340 U. S., pages 490, 491.

As stated, we do not attempt to restate the underlying evidence as it is carefully detailed in the Court's opinion. We do point out, however, that the issue involved was and is not limited to that stated by the Interstate Commerce Commission on page 16 of its Jurisdictional Statement, i. e., "ascertaining and determining whether the considered intrastate rates were causing discrimination against interstate commerce to the detriment of the national transportation system." That was only one of

the issues. For example, no one will argue that an increase in intrastate rates can be justified under Section 13 (4) if the end result is a decrease in revenue. This was one of the vital issues in this cause, as was the integral question of whether the Commission's finding on this point was supported by substantial evidence. On this question of the effect of an increase in intrastate rates upon intrastate revenues, there is no reason to believe that the Interstate Commerce Commission has any superior competence. On the contrary, there is every reason to believe that the Mississippi Commission is in the better position to make an authoritative determination. Just like the Interstate Commerce Commission on the national level, the Mississippi Commission has a continuing responsibility backed by an accumulated body of expert knowledge and, in addition, it has a special and favorable familiarity with local transportation conditions and problems. Combined with this is the fact that the Mississippi Commission actually listened to the testimony of witnesses upon the questions. The Mississippi Commission's order was a part of the record in this proceeding and, as such, it was quite appropriate for the District Court to consider it, just as the Supreme Court held in *Universal Camera* that the report of the Trial Examiner was a proper part of the record and entitled to consideration by the Court.

We make the foregoing observations also for the purpose of pointing out that, in *King v. United States,* 344 U. S. 254, it was said:

> "It is conceivable that some considerations properly given weight by the Commission in prescribing interstate freight rates in a general revenue proceedings might not be applicable equally to transportation within a particular State."

By this and other statements in the *King* case, the Court has recognized that a difference in local conditions within a given state are pertinent and proper considerations in Section 13 cases. We submit that the whole body of the testimony in this case establishes that the Commission not only was not supported by substantial evidence in its essential findings but that the Commission failed and refused to give any consideration to the difference in local conditions conclusively established by the overwhelming weight of the evidence.

We submit again that the appellants here seek to have this Court repeat a function already ably and correctly performed by the District Court—that of reviewing the evidence to determine its substantiality. Since the lower court, which has the "primary responsibility" (*National Labor Relations Board v. Pittsburg S. S. Co.*, 340 U. S. 498), has determined, after full consideration, that the essential findings are not supported by substantial evidence, there appear to be no special circumstances which would warrant a recanvassing of the record by a second reviewing court.

## II.

## THE OTHER ALLEGED ERRORS OF LAW COMMITTED BY THE DISTRICT COURT.

(a) *Whether the District Court erred in holding the evidence legally insufficient because there was no segregation of interstate and intrastate operating statistics.*

By this argument, appellants endeavor to give the impression that the District Court struck down the Commission's order because there was no separation by the railroads of their revenues, expenses and properties as

between interstate and intrastate operations. The District Court did *not* hold that "the evidence was legally insufficient" because it did not show such a separation. This feature was mentioned only once by the District Court and then only in a passing and discussatory fashion. On page 815 of 124 F. Supp., the Court said: "There was no separation made by the railroads of their revenues, expenses and properties as between interstate and intrastate operations." The correctness of this statement is beyond dispute. But nowhere in the Court's opinion is there any suggestion or inference that the Court held the evidence to be legally insufficient *because* of the absence of such a separation. The quoted statement was merely fair and legitimate comment and was not in any sense the reason advanced by the District Court for its ultimate holding that the Commission's order was not supported by substantial evidence. Thus this question falls of its own weight.

(b) *Whether the District Court erred in holding that it was necessary that discrimination against interstate shippers be shown before the Commission could exercise its power under Section* 13 (4).

This is another attempt to inject a question based upon a non-existent holding of the District Court. Nowhere in its opinion did the Court below base its conclusion and decision upon this question; in fact, the opinion clearly and specifically recognizes that the question of preference and shipper injury is not involved. Again we quote from the District Court's opinion:

"Section 13 (4) prohibits two types of preference and discrimination, in respect to intrastate and interstate rail rates, preference and prejudice as to persons and localities, and discrimination against interstate com-

merce. *The Commission report of November* 2, 1953, *found that no evidence was offered as to undue prejudice to interstate shippers. The remaining issue relates only to discrimination against interstate commerce.*" 124 F. Supp., page 813 (Emphasis added)

Thus we see that the Court below specifically recognized that the issue of preference and prejudice against persons and localities was not involved, and that the sole issue related to discrimination against interstate commerce. The statement relied upon by appellants was made by the Court below merely as a part of a general discussion of the power of the Commission under Section 13 (4), and it is difficult to understand how the appellants could interpret it as the basis or one of the bases of the Court's decision. This question likewise falls of its own weight, as it is totally unrelated to the District Court's decision.

(c) *Whether the District Court erred in holding that the Commission committed an error of law in disregarding the evidence that passenger deficits were substantially lower in Mississippi than in the South generally or the nation as a whole.*

In this connection, the Commission's Statement as to Jurisdiction states (page 4) that "This presents also the question whether the Commission actually did disregard the evidence as to passenger deficits." We submit that the Commission's report in the instant case makes it clear that the Commission did categorically reject the appellee's theory and contentions in this respect. In its report in the Section 13 proceedings here involved (291 I. C. C. 39, 63), the Commission said:

"The *novel theory of ratemaking* advanced by the Mississippi commission contemplates that the freight-

rate structure would vary according to variations in the passenger revenue by territories, areas, States, and possibly by individual lines of railroad. Some of the respondents operate no passenger service. *There is no sound basis for the contention that rate variations are justified because of such variations in passenger revenues.*" (Emphasis added.)

We think this makes it clear that the Commission ignored and dismissed all considerations of dissimilarities in passenger deficits in Mississippi as merely a "novel theory of ratemaking" and that it failed and refused to give consideration to the substantial evidence which clearly established different conditions which required a different treatment of Mississippi intrastate freight rates. Regardless, however, of what the Commission did or did not say, the evidence offered by the Mississippi Commission (taken from the carriers' official reports) was in the record and was not contradicted. Therefore, in reaching the conclusion it did the Commission necessarily disregarded it. There can be no other explanation. This evidence showed conclusively that the railroads' passenger deficits in Mississippi were substantially less than their deficits for their system-wide operations. These facts are shown by Exhibits 59, 60, 61, 62 and 63. For example, Exhibit 59 shows that the passenger operating ratio for the system operations of the carriers involved for 1951 was 134.71% while the passenger operating ratio for Mississippi was 123.27%, a difference of 11% in favor of Mississippi. Exhibit 61 shows that the Illinois Central Railroad in 1952 operated only 33.22% as many passenger car miles in Mississippi as it did in 1939, while for the system outside of Mississippi the corresponding percentage was 64.68%. This higher annulment of passenger

service in Mississippi necessarily resulted in a reduction of the passenger deficits.

The purpose of this and other testimony was to show that in Mississippi, since there was a smaller passenger deficit, there was a lesser basis for an increase in intrastate freight rates. This is but a logical extension of the doctrine laid down in *King v. United States,* 344 U. S. 254, where this Court upheld the Commission's contention that, in determining the reasonable level of freight rates to produce overall operating revenues, the Commission might take into consideration the deficits in passenger service operations. It appears to be the heighth of contradiction to urge, on the one hand, that the *fact* of a passenger deficit is to be considered but the *extent* of the deficit, whether one dollar or ten million, must be ignored. It follows logically, in our opinion, that, in balancing passenger deficits with freight revenue, additional returns from freight operations may be required only to the extent necessary to offset the passenger deficit and provide a fair aggregate return. If this be not correct, then it follows that freight rates are to be raised above a reasonable level where the passenger deficit is nonexistent or moderate.

We submit, therefore, that the Court below was correct in holding that the Commission erred in failing to give consideration to Mississippi's substantially lower passenger deficit, and that, in so holding, the District Court correctly interpreted *King v. United States.* In that case, however, the record disclosed that the passenger operating ratios of the three principal Florida railroads were approximately equal to that of the Southern Territory. In our case the record shows a substantially lower passenger operating ratio for Mississippi, and the inference is clear from the *King* case that dissimilarities in condi-

tions between States should be given due consideration as an important factor. Thus we say that, based on the *King* case, the District Court was correct in its conclusion that:

> "The Interstate Commerce Commission committed an error of law in disregarding the evidence that passenger deficits in Mississippi were substantially lower than in the South or the nation as a whole." 124 F. Supp., page 817.

## CONCLUSION

We again submit that regardless of any other question which the appellants may endeavor to raise the "paramount question" before the District Court was whether the Commission's order was supported by substantial evidence. If this question be determined adversely to appellants, this case should and must be affirmed, and the remaining questions injected fade into insignificance. We submit again that the District Court neither "misapprehended" nor "grossly misapplied" the standards laid down in the *Universal Camera* case and that there is no necessity for this Court to repeat the function of canvassing the evidence which has already been performed by the Court which, as stated in *National Labor Relations Board v. Pittsburg S. S. Co.* 340 U. S. 498, has the "primary responsibility" and which has determined, after full consideration, that the evidence before the Commission was not endowed with that degree of substantiality sufficient to support the Commission's order.

In the *Pittsburg Steamship* case the Circuit Court of Appeals had held that a Labor Board order was not supported by "substantial evidence on the record considered as a whole." The Supreme Court was asked to reverse this holding but the Court said:

"This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair minded judges could find it tilting either way. *It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony where on a conscientious consideration of the entire record a Court of Appeals under the new dispensation finds the order unsubstantiated.* In such situations we should 'adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations.' Federal Trade Comm'n v. American Tobacco Co., 274 U. S. 543, 544." 340 U. S., page 503. (Emphasis added.)

We submit that this rule is equally applicable here and that, under it, the judgment of the District Court herein must be affirmed.

The Commission suggests (Jurisdictional Statement, pages 20-22) that, not only should the appeal be granted, but that the lower court should be reversed without argument on the basis of *King v. United States,* 344 U. S. 254, *Montana v. United States,* 117 F. Supp. 174, *Tennessee v. United States,* 113 F. Supp. 634, affd. 346 U. S. 891, reh. den. 346 U. S. 928, and *Louisiana v. United States,* 125 F. Supp. 180, affd. 348 U. S. 885, reh. den. Jan. 10, 1955. Not only do these cases fail to give to appellants the aid and comfort they seek but, in fact, they are substantially different from the instant case.

In these cases, the District Courts had in each instance found that the Commission's findings were supported by substantial evidence. The appellants in those cases, therefore, were asking the Supreme Court to recanvass the

evidence and to conclude that the lower courts were wrong. *This is just what the appellants are asking here.* On the other hand, we are saying that the decision of the District Court should be given exactly the same support that this Court gave the District Courts in the cited cases. In other words, the shoe is now on the other foot, and we take the same position here as the Commission did in the cited cases while the Commission's position is reversed. We say, just as the Commission did in the cited cases, that the conclusion of the District Court after its review of the entire record should not be disturbed. Therefore, these cases support our view rather than that of the appellants.

As to the Commission's reliance on the *Montana* case for a summary reversal here, we point out that the reversal there was dictated by completely different circumstances. The order of the Supreme Court in the *Montana* case shows that the case was reversed so that the District Court could apply the principles of the *King* case, which had recently been decided. Here there has been no intervening decision; the Court below was aware of the *King* case and of its obligation to follow its principles. Therefore, there is no basis for comparing the result in the *Montana* case with the situation now presented.

As to all of the cases mentioned, we make the observation that in each case the factual situation controls. Merely because the Commission's order was upheld in those cases does not mean that the order in this case must be upheld regardless of the evidence or anything else. This Court has never taken the position, either in *King* or any other case, that the fact that there was substantial evidence to support a Commission order in one case compels the conclusion that there is such evidence in all other cases. Each case must be controlled by its own facts, and

we do not agree that the factual situation here is identical with or substantially similar to the factual situation in the *Louisiana* case or the other cases relied on by appellants.

For all of the reasons discussed, we respectfully submit that the decision of the Court below is correct and that these appeals present no substantial question. Accordingly, the judgment of the District Court should be affirmed. Respectfully submitted,

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